**OCBC BANK (MALAYSIA) BHD**

**v.**

**PELANGI BAIDURI SDN BHD**

HIGH COURT MALAYA, MALACCA
LOW HOP BING J
[ORIGINATING SUMMONS NO: MT1-24-90-2003]
29 NOVEMBER 2005

***LAND LAW:*** *Charge - Order for sale - Application for - Allegation of misrepresentation - Whether established - Whether defendant in default of repayment - Cause to the contrary - National Land Code s. 256*

This was an application by the plaintiff for an order for sale of a piece of land charged to it by the defendant as security for a loan it granted to the defendant. It was not in dispute that the defendant, as chargor, had defaulted in the repayment of the loan in breach of the loan agreement and terms of the charge instruments. That notwithstanding, the defendant averred that the plaintiff was guilty of misrepresentation, such that it was unconscionable for the court to grant the order for sale applied for. The issue was whether the defendant had proved its allegation, and in any case whether it had shown any cause to the contrary as required by the law.

**Held (allowing application):**

**[1]** There was nothing in the defendant's affidavit to establish the existence of misrepresentation on the part of the plaintiff. The defendant's scant reference to misrepresentation per se without condescending to particulars would not suffice. Further, the contention on the point of misrepresentation ran counter to contemporary documents. (p. 413 g-h)

**[2]** The provisions in paras. 2(i) and 2(g) of the plaintiff's letter of offer were clear in that the term loan must be repaid by a lump sum payment on the earlier occurrence of the two events *viz*. either three years after the date of the first drawdown of the term loan or by redemption of the individual units to be developed. None of these had materialized as the defendant had defaulted in the repayment thereof. (p. 414 c)

**[3]** Had there been misrepresentation, it would have been reasonable for the defendant to raise the issue in 1997 - and not in 2005 - long after it had utilised the facility and defaulted in the repayment. Clearly, the alleged misrepresentation is a product of an afterthought. The non-repayment by the defendant has resulted in the failure of the defendant to redeem the title and so the default lies with the defendant. (p. 414 e-f)

**[4]** The defendant has failed to establish any cause to the contrary. Consequently, the court would make an order for sale in terms of the plaintiff's application. (p. 415 h)

**Case(s) referred to:**
*Co-operative Central Bank Bhd v. Belaka Suria Sdn Bhd [1991] 3 CLJ 2131 HC* ***(refd)***
*Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC* ***(refd)***
*Murugappa Cettiar v. Letchumanan Chettiar [1939] MLJ 296 HC* ***(dist)***
*Oh Hiam & Ors v. Tham Kong [1980] 2 MLJ 159 PC* ***(dist)***
*Overseas Chinese Banking Corporation Ltd v. Lee Tan Hwa & Anor [1989] 1 MLJ 261 HC* ***(dist)***
*Public Finance Bhd v. Narayanasamy [1971] 2 MLJ 32 FC* ***(dist)***
*United Malayan Banking Corp Bhd v. Chong Bun Sun And Another Application [1994] 2 CLJ 673 HC* ***(refd)***

**Legislation referred to:**
Courts of Judicature Act 1964, s. 73
National Land Code 1965, ss. 149, 256(2), (3), 257(1)(c), 340
Rules of the High Court 1980, O. 83

*For the defendant - PS Ranjan; M/s PS Ranjan & Co*
*For the plaintiff - Chan Kok Cheong; M/s Shook Lin & Bok*

*Reported by Rose Aziz*

## JUDGMENT

**Low Hop Bing J:**

### Application

This is the plaintiff's application by way of charge action *vide* originating summons in encl. (1) for an order for sale pursuant to a charge registered under presentation No. 8534/97 Jilid 589, Folio 95 ("the charge") over the land held under Advance Certificate of Title Holding No. 553, mukim of Bertam, Melaka ("the land").

### Factual Background

The defendant is the registered owner of the land over which the defendant had on 2 October 1997 executed the charge which was registered on 4 October 1997, for the purpose of securing a term loan of RM5,000,000 pursuant to the plaintiff's letter of offer dated 27 September 1997 ("the letter of offer") and the term loan agreement executed by the defendant on 2 October 1997 ("the term loan agreement").

The defendant has agreed to repay all sums due thereunder with interest and costs thereon in accordance with cl. 3.1 of the charge.

Although the defendant has utilised the term loan granted by the plaintiff, the defendant has failed, refused or neglected to repay the same on its due date.

By a letter dated 4 December 2002, the plaintiff informed the defendant that the plaintiff was agreeable to reschedule the term loan facility on the following terms and conditions which were duly accepted by the defendant:

1. the tenure of the term loan was extended for one year from its maturity date to 4 October 2001; and

2. the term loan was to be repaid in one lump sum on 4 October 2001.

In breach of the rescheduled terms and conditions, the defendant has failed to repay the term loan on its due date.

By letter dated 21 May 2005, the plaintiff through its solicitors demanded from the defendant payment of the sum with interest due and owing thereunder, but the defendant has again failed to do so, thereby committing a breach of cl. 3.1 of the charge.

After the defendant has continued with the breach for more than one month, the plaintiff has through its solicitors issued a notice of default in Form 16D dated 3 July 2002 ("the statutory notice") pursuant to the National Land Code 1965, requiring the defendant to remedy the breach within a further period of seven days from the date of service of the statutory notice, failing which the plaintiff would seek an order for sale.

The statutory notice was served on the defendant at, *inter alia*, its registered office at No. 15-A, Jalan Kilang, 75300 Melaka.

To date, the defendant has failed to remedy the breach.

The above factual background has not been disputed by the defendant.

**Charge Action: Governing Principles**

It is useful for me to refer to s. 256(3) of the National Land Code 1965 which, where relevant, provides that on an application for an order for sale, "the Court shall order the sale of the land ... to which the charge relates unless it is satisfied of the existence of cause to the contrary."

A reference hereinafter to a section is a reference to that section in the National Land Code 1965 unless otherwise stated.

The Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 has the occasion to consider the provisions of s. 256(3). The judgment was delivered by Gopal Sri Ram JCA who stated that a High Court

is entitled to refuse an order for sale once it is satisfied of the existence of "cause to the contrary", which may be established only in three categories of cases *viz* where the chargor is able:

1. to bring his case within any of the exceptions to the indefeasibility doctrine housed in s. 340;

2. to demonstrate that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale; or

3. to demonstrate that its grant would be contrary to some rule of law or equity.

**Misrepresentation**

Defendant's learned counsel Mr. P.S. Ranjan submitted that there was misrepresentation to which the plaintiff was a party or privy as a result of which the charge becomes defeasible.

He relied on the plaintiff's letter of offer dated 27 September 1997 pertaining to the redemption of individual titles and the plaintiff's failure to release the issue document of title to the Registrar of Titles for purposes of subdivision, adding that the defendant would not have created the charge if the plaintiff had not committed the said misrepresentation. Support was sought in *Murugappa Cettiar v. Letchumanan Chettiar* [1939] MLJ 296 HC; *Public Finance Bhd v. Narayanasamy* [1971] 2 MLJ 32 FC; *Overseas Chinese Banking Corporation Ltd v. Lee Tan Hwa & Anor (Goh Ah Chwee & Anor, Interveners)* [1989] 1 MLJ 261 HC; and *Oh Hiam & Ors v. Tham Kong* [1980] 2 MLJ 159 PC.

Learned counsel Mr. Chan Kok Keong contended for the plaintiff that misrepresentation has never been raised in the defendant's affidavit.

Nevertheless, he added that the letter of offer made the repayment of the term loan patently clear, but the defendant has failed to effect the repayment.

On my part, I am unable to find any allegation of fact in the defendant's affidavit to establish the existence of misrepresentation raised for the defendant. The defendant's scant reference to misrepresentation per se without condescending upon particulars would not suffice.

Quite apart from that, the defendant's aforesaid submission in effect runs counter to contemporary documents, in particular the plaintiff's letter of offer wherein the relevant portion of para 2(i) reads as follows:

| | | | | |
|---|---|---|---|---|
| a | i | Repayment | : | Principal<br><br>By a lump sum payment of RM5.0 million on expiry of the loan tenure or by redemption of individual units to be developed, whichever is the earlier. |

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It has been expressly agreed by the defendant that the tenure of the loan is three years from the date of first drawdown (para. 2(g) of the letter of offer).

The above provisions in para. 2(i) and 2(g) are clear and unambiguous in that the term loan must be repaid by a lump sum payment on the earlier occurrence
c of the two events *viz* either three years after the date of first drawdown of the term loan or by redemption of the individual units to be developed. The true position is that the defendant has defaulted in the repayment thereof.

Despite the defendant's default, the defendant had obtained an extension of one year to repay the term loan on 4 October 2001 as stated in the plaintiff's
d letter dated 4 December 2000, the acceptance of which one Yap Kwee Teng, a director of the defendant has confirmed by his manual signature with the defendant's company stamp and company registration number affixed thereto on 18 December 2000.

e Had there really been misrepresentation as alleged by the defendant, it would have been reasonable for the defendant to raise it in 1997, and would not have waited until 2005, some 8 years later, long after the defendant had utilised the term loan facility in 1997 and has defaulted in the repayment. The alleged misrepresentation is a product of an afterthought. The non-repayment by the
f defendant has in effect resulted in the failure of the defendant to redeem the title and so the default lies with the defendant.

Although *Murugappa Chettiar*, *supra*, cited for the defendant, concerns an application for the sale of charged land under the then s. 149 of the Land Code, the issue of misrepresentation has never been raised there. As a matter
g of fact, the first instance judge there has failed to deal with the allegation, *inter alia*, that the repayment of the mortgage money (loan sum) had been made. That failure had resulted in the setting aside of the order for sale.

For purposes of completeness, I shall now consider the other authorities cited
h for the defendant.

In *Public Finance, supra*, there was an application by the financier for an order for sale of the whole of 187 acres of the charged land although some 100 acres had been fragmented and sold to sub-purchasers. As there were elements of fraud and collusion, the learned trial judge had dismissed the

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application for an order for sale. That decision was affirmed by the Federal Court through the judgment of Ong CJ (M) (as he then was). The facts there are entirely different from those in the application before me.

The facts in *Overseas Chinese Banking Corporation, supra*, reveal that the chargors had created a charge over the whole land when a substantial portion was owned by the interveners who had purchased and taken possession of their share of the land. Eusoff Chin J (later CJ (Malaysia)) dismissed the application for an order for sale, holding that the charge could not be a valid charge. Again, the facts there are completely distinguishable from the factual matrix in this application before me.

The Privy Council decision in *Oh Hiam, supra*, does not have any nexus with an application for an order for sale. Instead, it concerns a writ action arising out of a sale and purchase of land in which mistake was pleaded for which rectification was sought.

In the circumstances, I am of the view that the authorities presented for the defendant are wholly unsupportive and without merits.

**Contrary To Law Or Equity**

It was stressed for the defendant that it is against all notions of conscience for the plaintiff to obtain an order for sale.

The stand taken for the plaintiff is that it is just and equitable for the plaintiff to do so.

I am of the view that this issue raised for the defendant revolves around and is an extension of the issue of misrepresentation as ventilated for the defendant above. There is not an iota of allegation in this regard in the defendant's affidavit in reply. The truth is that the defendant has committed breaches of the loan agreement and terms of the charge, arising out of the fundamental default of the defendant in the repayment of the loan. This simple, straight forward and undisputed default remains the focus of the plaintiff's application.

I am unable to see any substance in the submission for the defendants.

**Order For Sale**

On the foregoing grounds, I hold that the defendant has failed to establish any cause to the contrary. I therefore make an order for sale in terms of the plaintiff's application herein. Pursuant to s. 257(1)(c), the total amount due to the chargee as at today's date is RM7,523,820.96 and the auction is fixed for 5 April 2006.

**Stay**

The final point raised for the defendant is intended to seek a stay of the enforcement of the order for sale under s. 256(2), pending the disposal of the defendant's counterclaim in this court *vide* civil suit No. 22-19-2005 ("the civil suit").

The plaintiff's response is that:

1. the instant originating summons in an action *in rem*, while the defendant's counterclaim is an action *in personam*, both of which are mutually exclusive, referring to *Co-operative Central Bank Bhd v. Belaka Suria Sdn Bhd* [1991] 3 MLJ 43 HC; and

2. under s. 256(2), the civil procedure is provided for in O. 83 of the Rules of the High Court 1980, citing *United Malayan Banking Corp Bhd v. Chong Bun Sun And Another Application* [1994] 2 MLJ 221 HC.

In my judgment, it is pertinent to note that s. 256(2) regulates an application for an order for sale "in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure."

The civil procedure prescribed in s. 256(2) is O. 83 (see p. 45F-G left column in *Co-Operative Central Bank, supra*, per Lim Beng Choon J).

In *United Malayan Banking Corp Bhd, supra*, Visu Sinnadurai J (as he then was) at p. 227 D-E held, *inter alia*, that the chargee needs to comply with the requirements of O. 83, as spelt out in s. 256(2).

First of all, it is to be noted that at this stage there is no appeal filed against my decision. It is trite law that an application for stay is only to be considered if there is an appeal pending against the decision with which a party is dissatisfied. Even an appeal shall not operate as a stay s. 73 Courts of Judicature Act 1964. Hence the defendant's application for stay should be dismissed *in limine*.

The application for stay must be made in relation to and in connection with the same proceedings, showing special or exceptional circumstances in order to assist the court in the exercise of its judicial discretion whether or not to grant, after considering the facts of each particular case and having regard to established judicial principles. I can find no special or exceptional circumstances here.

In respect of the other ground relied upon by the defendant in relation to the defendant's counterclaim in the civil suit, I am of the view that it was commenced in a separate and distinct suit for loss and damage against the plaintiff. It is an action *in personam*, while this originating summons for an order for sale of the land is an action *in rem*.

In *Co-Operative Central Bank, supra*, there was an appeal by the plaintiff against the learned trial judge's refusal to enter O. 14 judgment in favour of the plaintiff. The plaintiff has appealed to the then Supreme Court. Meanwhile, there was an originating summons filed by the plaintiff against the defendant. The defendant applied for a stay of the hearing of the originating summons and all further proceedings until the disposal of the appeal in relation to the O. 14 proceedings. Lim Beng Choon J (as he then was) dismissed the defendant's application for stay, holding, *inter alia,* that:

1. An appeal does not amount to a stay; and
2. The action for recovery of the debt and to obtain an order for sale are two different actions and are intended to bring about different remedies.

By reason of the above, as I am unable to find any merits in the defendant's application for a stay of the order for sale, I dismiss it with costs.